

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-1404

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1404

UNITED STATES OF AMERICA

Appellee

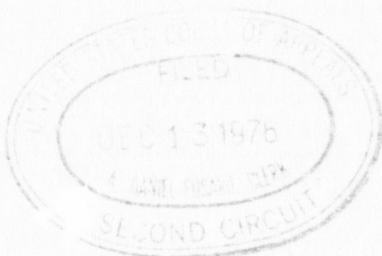
— against —

HARRY LEVINE BENSON, *et al.*

De facto & Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT
HARRY LEVINE BENSON



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Appellee,

Docket No. 76-1404

-against-

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Defendants-Appellants.

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REPLY BRIEF FOR THE APPELLANT HARRY LEVINE BENSON

Preliminary Statement

This Reply Brief is being submitted to the Court in response to the brief of the government that was received by counsel for the appellant Harry Levine Benson on December 3, 1976.

Response to Point One of the Government's Brief

The government argued throughout the trial, from its opening remarks through summation, that its main witness, Hans Buhler, was the lawful owner of a 9.88 carat diamond. It concedes, in Point V of its brief, that the ownership of the gems was an issue for the jury, and at the very least it certainly was.

The defense argued in summation that Buhler had never brought two valuable stones to the United States in December, 1974. The jury, if

they had heard Werner Barth's testimony, may well have agreed with this argument.

If the jury believed that Barth had not sold a 9 carat diamond to Buhler, as Buhler claimed, then if instructed, as requested, under Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952), the jury could have found that the truth was the opposite of what Buhler claimed, that Buhler did not own the diamond as he claimed and had not brought these valuable stones to the United States in December, 1974.

In United States v. Aguilar San Juan, F.2d , Slip Op. 471 (2nd Cir., Nov. 10, 1976, p. 481-82), the Court reversed the conviction of a defendant convicted of violating the Bank Secrecy Act, because she had not had the opportunity to meet the government's proof on the issue of wilfulness. In this matter the defense, through no fault of his own, was precluded from presenting evidence on an issue that was of key importance, the identity of the rightful owner of the stones and this was manifestly unfair.

The government in Point II of its brief concedes that the appellant Benson was not arraigned on this indictment until Friday, May 7, 1976 and counsel first appeared for him on Monday, May 10, 1976. The appellant who retained the services of an attorney and a private investigator in Switzerland to assist him in preparing for the trial had received no information from either one of them until May 24th (See appellant's Appendix A-60, A-61, Benson's letter to the Court dated May 21, 1976). Werner Barth did not return

to Switzerland until May 25, 1976 (See Appellant's Appendix A-71, Investigator's report dated May 19, 1976).

Neither the appellant Benson or his counsel knew what Werner Barth's testimony would be prior to the start of the trial on Monday, May 24, 1976. There was no testimony at the trial that Benson had ever met Barth or known of his having sold the 9.88 carat diamond to Buhler. The record indicates that upon learning of the role attributed to Werner Barth by Buhler, Benson made every possible effort to interview Werner Barth to get his version of the story, and this could only be accomplished on May 25, 1976.

The civil deposition of Hans Buhler taken on June 11, 1975 was conducted in the absence of the appellant Benson. He did not appear, nor did any party representing his interests appear on his behalf, as is readily apparent from the minutes of the examination before trial themselves.

Response to Point II of the Government's
Brief.

The government claims that Benson was responsible for creating a situation that required a continuance, and therefore not entitled to one, and cites two cases in support of their novel theory, but neither one has any relation to the facts of this case. In United States v. Haller, 333 F.2d 827, 828 (2nd Cir. 1964), the indictment had been outstanding for five years and during that time the defendants had been represented by counsel. On June 17, 1963 the defendants were notified that their trial was to commence on September 30th.

On the day scheduled for trial the defense moved for a continuance to depose one Cavaglieri, residing in Italy. The Court pointed out that the accused were represented in June by the same attorney who represented them on their trial and the witness Cavaglieri could not have given testimony on any of the issues raised on the trial, and denied the continuance. In United States v. Rosenthal, 470 F.2d 837, 844 (2nd Cir. 1972), the Court denied a request for a continuance when, four days prior to trial, the defendant discharged his lawyer stating the lawyer was unprepared and inexperienced. This attorney had represented the accused from the time the indictment was first filed, almost two years earlier, and the accused had received six weeks' notice of the trial date.

In this case, the accused was not represented by counsel until May 10th. The initial request for a continuance was made when counsel first appeared before the court and the witnesses involved in this case are in Switzerland. Every effort was made to interview Werner Barth prior to trial, but for reasons over which the accused had no control, this could not be done, and no pre-trial representation could have been made to the Court concerning Werner Barth's testimony.

Response to Point VIII of the Government's
Brief.

On May 27, 1976 while Buhler was still on the witness stand, a conference was held at which the government stated that it would not produce

customs declarations allegedly prepared by Hans Buhler in June and December, 1974.

The Court and defense counsel both believed that the customs declarations prepared by Buhler would be produced by the government, the documents having been prepared by Buhler and related to his direct examination.

The failure to obtain Buhler's customs declarations is directly attributable to the prosecution which made no effort to locate these documents prior to May 20, 1976. The document that the government finally obtained and turned over on August 25, 1976 was a customs declaration prepared by Hans Buhler, Sr. This declaration states that the year of birth of the individual preparing it is 1909, and the witness Hans Buhler is approximately forty years of age. This fact and its possible significance could not have been lost on counsel for the government. The defense at such a late date had no way to investigate whose customs declaration it actually was, and the circumstances under which it was prepared.

The customs declarations and the customs service file on Hans Buhler could have been admitted as affirmative evidence under Rule 803 (8)(b) and (c) of the Federal Rules of Evidence, or as impeachment material under Rules 803(10) and 613(b) of the Federal Rules of Evidence. The government stipulated at the trial to the fact that Buhler made no customs declaration in December, 1974, and this was after Buhler was excused. The government entered into this stipulation because they believed it to be

relevant to the issues before the Court. The government at the trial took the position along with defense counsel that the Court should examine the file maintained by customs on Hans Buhler before deciding whether to make it available to defense counsel, but the government did not argue that the material was irrelevant.

The change of position of the government on this appeal is an attempt to gloss over their own failures to produce documents that are maintained in their own care and custody. The government could not possibly argue that the customs file on Buhler was irrelevant since presumably, they have never seen it. Benson's brief refers to the government having filed its notice of readiness in August, 1975 and stating that it would require 30 day's notice to be ready to proceed. The government knew that all the relevant witnesses and documents would require some time to assemble for trial, but waited until the eleventh hour, May 20th, to try and obtain customs declarations from Los Angeles, California. The government's failure to produce the customs declarations and customs file was gross neglect that amounted to bad faith.

The government cites three cases in support of its argument that the materials sought by subpoena from customs were irrelevant. An examination of the cases show that they have no applicability to the matter before this Court.

In United States v. Purin, 486 F.2d 1363, 1368 (2nd Cir. 1973), the defense served a subpoena duces tecum on the Immigration and

Naturalization Service for its file on an individual named Romero. The Court held that if Romero was called as a witness it would turn over those portions of the file that could be used on either direct or cross-examination. Romero was not called as a witness, and the file was not made available to counsel. In United States v. Marchisio, 344 F.2d 653, 669 (2nd Cir. 1965), the defendants were charged with perjury, and the principal government witness was a man named George Martocci, a co-defendant. The defense sought to subpoena a memorandum prepared in 1956 by Martocci's accountant wherein the accountant proposed certain bookkeeping and accounting procedures for Martocci's firm. The accountant was not called as a witness. The defendant Marchisio did testify and the document was relevant but no request was made at this juncture for the document. In United States v. Reyes-Padron, F.2d , Slip. Op. 4757, 4761-62 (2nd Cir. 1976), the defense requested a file maintained by the Immigration and Naturalization Service on a government witness. The government made a good faith effort to get it, but was unable to do so. Defense counsel however was familiar with the contents of the file since it had been produced at an earlier trial of Padron's co-defendants, where the same witness testified and Padron's counsel had represented one of the co-defendants.

If the Customs Service believed that Buhler was an important enough individual for them to maintain a file on, it may be that the file was maintained because Buhler was believed to be a smuggler. Buhler's entry

into this country, if Customs believes him to be a smuggler, would unquestionably require him to submit to the most thorough, personal search of his person and property. The results of such a search as listed in his file with Customs could help to establish whether Buhler entered the United States in December, 1974 with a 9 carat diamond or an 8 carat emerald.

The files maintained by Customs were relevant to the examination of the witness Buhler, and should have been examined by the Court before deciding whether to make them available to defense counsel.

Response to Point IX of the Government's
Brief.

The appellant requested that the Court charge the jury on the negative inferences that can be drawn from false testimony. It is clear that a timely request for an instruction to a jury is sufficient to preserve that issue for appellate review if the request is denied. United States v. Bermudez, 526 F.2d 89, 97 (2nd Cir. 1975).

The jury, if instructed as requested under Dyer v. MacDougall, supra, and with the testimony of Barth before it, could have found that Buhler never had lawful possession of the diamond and they might have then found that, disbelieving Buhler as they did on his ownership of the diamond, they might have concluded that Buhler never brought the two gems to the United States in December.

The issue raised by the appellants at the trial was that Buhler

had never brought two gems into the United States. The government, to buttress its contentions that the stones were here in December, 1974, claimed that Buhler was the lawful owner of the stones and referred to six documents to support its claim.

The government wanted the jury to conclude that Buhler was the lawful owner of the gems, and his handling and subsequent sale of the stone, although unorthodox, were his concern and his alone since he was dealing with his property. If the jury concluded that the stones were not his property, based on Barth's testimony, they could then reject his story and believe that the events transpired the way in which the defense contended. The jury should have been instructed as requested since the accused has no burden of proof and the jury could draw negative inferences from the government's witnesses testimony without any proof being offered by the defense.

Conclusion

For the reasons set forth in Appellant Benson's brief and reply brief, the judgment below should be reversed with a direction that the indictment be dismissed or in the alternative that the appellant Benson be granted a new trial.

Respectfully submitted,

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